No. 18-2486

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE DONALD J. TRUMP, President of the United States of America, in his official capacity,

Petitioner.

On Appeal from the United States District Court
for the District of Maryland
(Peter J. Messitte, District Judge)

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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INTRODUCTION AND RULE 35(b) STATEMENT

Before the panel's decision, no appellate court had ever used mandamus to take jurisdiction under 28 U.S.C. § 1292(b) where the district court had considered and rejected certification. Nevertheless, the panel exercised appellate jurisdiction over (and then disposed of) this suit of "national significance" (Op. 14) in this unprecedented way. With that decision, the panel not only committed legal error, but also effected a sweeping expansion of appellate jurisdiction irreconcilable with the terms of Section 1292(b) and the decision of every court that came before it. *See In re Trump*, 2019 WL 3285234, at *1 (D.C. Cir. July 19, 2019) (acknowledging that the panel decision created a "divide[]" between the Fourth Circuit and other courts of appeals). *En banc* review is imperative on this ground alone.

Having improperly acquired appellate jurisdiction, the panel then compounded its error by reversing and remanding the suit with instructions that it be dismissed because the District of Columbia and Maryland lack Article III standing. That decision conflicts with the Supreme Court's repeated recognition of states' quasi-sovereign interests and the cognizable ways in which those legally protected interests can be invaded. *See Massachusetts v. EPA*, 549 U.S. 497 (2007); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982). It also conflicts with decisions from numerous appellate courts recognizing the competitor standing doctrine and permitting cases to proceed in analogous

circumstances. The proper articulation and application of these well-established doctrines constitute questions of exceptional importance that merit *en banc* review.

BACKGROUND

1. The U.S. Constitution expressly prohibits the President from receiving any "Emolument" from foreign or domestic officials. *See* U.S. Const. art. I, § 9, cl. 8; *id.*, art. II, § 1, cl. 7. The Foreign Emoluments Clause bars anyone holding an "Office of Profit or Trust under [the United States]" from "accept[ing] . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" unless Congress consents. *Id.* art. I, § 9, cl. 8. The Domestic Emoluments Clause entitles the President to receive a salary and benefits fixed in advance by Congress, but prohibits him from receiving "any other Emolument from the United States, or any of them." *Id.* art. II, § 1, cl. 7. These broad prohibitions seek to ensure that the President will "have no pecuniary inducement to renounce or desert the independence intended for him by the Constitution." *The Federalist* No. 73 (Hamilton). The Domestic Emoluments Clause, in particular, was designed to prevent States from competing with each other—or against federal actors—to "corrupt [the President's] integrity by appealing to his avarice." *Id.* The Clauses do not doubt any particular president's good faith, but rest on an affirmative prophylaxis: accepting foreign emoluments is prohibited absent congressional

consent, and receiving domestic emoluments is prohibited regardless of whether Congress might approve.

Since taking office, President Trump has engaged in extensive and ongoing violations of both Clauses through his ownership interest in the Trump International Hotel Washington, D.C. ("the Hotel"). *See* Pet. Add. 149-54 (Am. Compl. ¶¶ 29-43); *see also* Pet. Add. 50-101 (holding that the amended complaint states a claim against President Trump for unlawful acceptance of emoluments); Dkt. 42 at 2-24 (Legal Historians Amicus Br.); Dkt. 40 at 5-29 (Niskanen Center Amicus Br.). This illegal conduct has undermined the District and Maryland's quasi-sovereign interests in pursuing governmental objectives free of pressure to gain the President's favor by patronizing his properties or granting him tax-based or other concessions. *See* Pet. Add. 15-19. It has also distorted competition for foreign and domestic government business. This injures the District and Maryland's proprietary interests in properties that compete with the Hotel and harms a sufficiently substantial segment of their residents to give them standing to sue as *parens patriae*. *See* Pet. Add. 20-25.

2. After the district court issued two reasoned decisions denying the President's motion to dismiss, he sought leave to file an interlocutory appeal under Section 1292(b). Dkt. 127. The district court denied that request in a detailed opinion, explaining that the President had not satisfied the criteria for certification

on standing or any other issue. Pet. Add. 129-30; *see generally* Pet. Add. 104-34 (Dkt. 135).

The President then filed a petition for a writ of mandamus with this Court and moved to stay the district court proceedings. Dkt. 151. This Court granted the stay and *sua sponte* ordered the parties to brief whether the District and Maryland have "alleged legally cognizable injuries sufficient to support standing." Dkt. 9.

Following oral argument, the panel granted the mandamus petition and, rather than remanding to have the district court do what the panel described as "pointlessly go through the motions of certifying" its orders for interlocutory appeal, took immediate jurisdiction under Section 1292(b). Op. 22. The panel then reversed the district court and remanded the case for dismissal with prejudice on the ground that the District and Maryland lacked standing.[1] Op. 26-36.

[1] The panel's dismissal of the case with prejudice conflicts with this Court's usual instruction that a "dismissal for lack of standing—or any other defect in subject matter jurisdiction—must be one without prejudice, because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013); *see also Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 633 (4th Cir. 2018) (applying the principle).

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S USE OF MANDAMUS TO TAKE JURISDICTION UNDER SECTION 1292(b) IS UNPRECEDENTED AND CONTRARY TO BASIC PRINCIPLES OF APPELLATE JURISDICTION.

Before the panel issued its decision here, no appellate court had *ever* taken jurisdiction under Section 1292(b) where the district court had considered and rejected certification. This unprecedented and atextual expansion of appellate jurisdiction warrants rehearing *en banc*.

Appellate review is generally available only after a final judgment has been entered by a district court. 28 U.S.C. § 1291. The Interlocutory Appeals Act, 28 U.S.C. § 1292(b), provides a limited exception to that requirement: "When a district judge . . . shall be of the opinion that [certification is warranted] . . . he shall so state in writing . . . [and t]he Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken." This statute—which provides for appellate review *only* where the district court is "of the opinion" that certification is warranted, *id.*—"serves the dual purpose of ensuring that [interlocutory] review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-75 (1978), *superseded on other grounds by rule as stated in Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1708-09 (2017); *see also id.* at 474-75 nn.24 & 25 (citing H.R. Rep. No. 1667 at 4-6 (1958)); *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002)

(Section 1292(b) "create[s] a dual gatekeeper system for interlocutory appeals"). In harmony with its sister circuits, this Court routinely reads Section 1292(b) to mean what it says. *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 137 (4th Cir. 1997) (no appellate jurisdiction "because the district court expressly declined to certify its order . . . under § 1292(b)"); *see also Calderon v. GEICO Gen. Ins. Co.*, 754 F.3d 201, 207 (4th Cir. 2014); *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 212-13 (4th Cir. 2012); *Madison v. Virginia*, 474 F.3d 118, 130 n.3 (4th Cir. 2006).

Consistent with the clear language and purpose of Section 1292(b), every court to consider the matter—until now—has determined that obtaining Section 1292(b) jurisdiction through mandamus is improper. *See In re Phillips Petroleum Co.*, 943 F.2d 63, 67 (Temp. Emer. Ct. App. 1991) ("[E]fforts to persuade a court of appeals to issue mandamus to compel certification by the district judge have uniformly proved unsuccessful." (internal quotation marks omitted)); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1338 (9th Cir. 1976) ("[M]andamus to direct [certification]" is not an "appropriate remedy."); *Pfizer, Inc. v. Lord*, 522 F.2d 612, 614 n.4 (8th Cir. 1975) ("This court is without jurisdiction to review an exercise of the district court's discretion in refusing [Section 1292(b)] certification."); *In re Maritime Serv. Corp.*, 515 F.2d 91, 92-93 (1st Cir. 1975) (describing mandamus to grant certification under Section 1292(b) as "wholly inappropriate"); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 755 n.1 (3d Cir. 1973) ("[F]orcing the district court to

make a certification under 28 U.S.C. § 1292(b) does not seem appropriate"); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1344 (2d Cir. 1972) ("Congress plainly intended that an appeal under § 1292(b) should lie only when the district court and the court of appeals agreed on its propriety. It would wholly frustrate this scheme if the court of appeals could coerce decision by the district judge."), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 256-57 (2010); *see also In re District of Columbia*, No. 99-5273, 1999 WL 825415, at *1 (D.C. Cir. Sept. 1, 1999) (per curiam) (similar).[2]

In "divid[ing] the courts of appeals" on the issue, *In re Trump*, 2019 WL 3285234, at *1 (D.C. Cir. July 19, 2019) (citing cases), the panel relied on *Fernandez-Roque v. Smith*, 671 F.2d 426 (11th Cir. 1982), and *In re McClelland Engineers, Inc.*, 742 F.2d 837 (5th Cir. 1984). But in neither case did the appellate court use mandamus as a vehicle to take appellate jurisdiction in the absence of the district court's Section 1292(b) certification. In *Fernandez-Roque*, the district court had entered a temporary restraining order and indicated that it planned to proceed to

[2] Scholars share this view. 16 Charles Alan Wright et al., *Federal Practice & Procedure* § 3929 (3d ed. 2018) ("Although a court of appeals may be tempted to assert mandamus power to compel certification, the temptation should be resisted. The district judge is given authority by the statute to defeat any opportunity for appeal by certification." (footnote omitted)); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 616-17 (1975) ("The courts of appeals have so far been unanimous in refusing to grant mandamus either to reverse the trial court's decision on certification or to review the underlying order on its merits. . . . [T]his is the correct result." (footnote omitted)).

an evidentiary hearing without ruling on its subject-matter jurisdiction. 671 F.3d at 428-29. On a petition for a writ of mandamus, the Fifth Circuit ordered the district court to rule on the jurisdictional issues and, upon request from a party, to certify its order for interlocutory appeal. *Id.* at 431-32. In *McClelland Engineers*, a party sought mandamus to vacate the district court's denial of a motion to dismiss or certify the order under Section 1292(b). The Fifth Circuit denied the mandamus petition and instead "request[ed]" that the district court certify the interlocutory order. 742 F.2d at 839. Neither case casts doubt on the judicial unanimity surrounding the unavailability of mandamus when the district court denies Section 1292(b) certification.[3]

The panel's remaining concern—that refusals to certify must be "[]reviewable" (Op. 21)—is misplaced. First, even if certification decisions were unreviewable, that is a function of Section 1292(b), which predicates appellate jurisdiction on the district court's broad discretionary power to certify. "Where a matter is committed to discretion"—here by Congress—"it cannot be said that a litigant's right to a particular result is clear and indisputable," as is needed for

[3] These courts may have guided the district court's hand in the Section 1292(b) analysis, but they did not usurp the district court's function or treat it as "pointless[]" (Op. 22), as the panel did here. Instead, the courts respected statutory limitations, preserved mandamus as the exceptionally rare remedy it was meant to be, and avoided the type of jurisdictional overreach in which the panel here engaged. *Accord In re Trump*, 2019 WL 3285234, at *1 (denying mandamus but remanding for reconsideration of the certification decision).

mandamus. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (internal quotation marks omitted). Second, and as importantly, even if there were a "truly egregious situation" in which a district court's Section 1292(b) ruling *could* be subject to mandamus, *In re Ford Motor Co.*, 344 F.3d at 654, this would not be such a case. There is nothing "whim[sical]" (Op. 16) in the district court's analysis, which—as the panel acknowledged—applied the correct standards and, after a careful discussion, concluded that "[t]he President has not satisfied the several criteria for certification of the issues that concern him" (Pet. Add. 129-30). Were the panel's decision to stand as precedent, *any* case with a plausible abuse-of-discretion claim could—and will—find its way before this Court through a mandamus petition, in the hope that an appellate panel will disagree with the district judge about whether there is a "reasonable difference of opinion" about a controlling legal question or whether the issues presented are of "special consequence" (Op. 16, 17). *En banc* review is thus warranted to avoid long-term institutional harm to this Court brought on by an influx of mandamus petitions seeking to second-guess district court certification decisions.

II. THE PANEL'S DECISION UNDERMINES ESTABLISHED STANDING DOCTRINES AND MISCONCEIVES THE COMPLAINT'S WELL-PLEADED ALLEGATIONS.

The panel further erred in its determination that the District and Maryland lacked standing. *En banc* review is necessary to ensure the proper articulation and

application of well-established standing doctrines to the complaint.

A. The Panel's Conclusion That the District and Maryland's Quasi-Sovereign Standing Is No More Than a "Generalized Grievance" Conflicts with Supreme Court Precedent and Threatens the Law of State Standing.

Rehearing is warranted to address the panel's erroneous holding that the District and Maryland's quasi-sovereign interests are nothing but a "generalized" interest in the enforcement of the Emoluments Clauses. Op. 34. That conclusion cannot be reconciled with the Supreme Court's recognition in *Snapp* and *Massachusetts* that an interest in equal sovereignty—which the Emoluments Clauses expressly protect—is fully sufficient to support state standing.

In *Snapp*, the Supreme Court recognized that a "State has an interest in securing observance of the terms under which it participates in the federal system." 458 U.S. at 607-08. Subsequent cases, including *Massachusetts*, have reiterated that when States suffer harm to interests they possess *as States*, they have demonstrated injury-in-fact. *See* 549 U.S. at 520; *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268 (4th Cir. 2011) (collecting cases holding that States may sue to vindicate their own governmental interests); *see also Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (States possess a constitutionally protected interest in "equal sovereignty").

The District and Maryland assert precisely this interest under the Emoluments Clauses. The Domestic Emoluments Clause protects the equal sovereignty of the

States by ensuring that the President cannot be "tempt[ed] . . . by largesses, to surrender . . . his judgment to their inclinations." *The Federalist* No. 73 (Hamilton); *see* Akhil Reed Amar, *America's Constitution: A Biography* 182 (2005) (explaining that the Domestic Emoluments Clause "prohibit[s] individual states from greasing a president's palm"). The Foreign Emoluments Clause likewise protects States in their sovereign capacity from having the federal balance of power tilted unlawfully in favor of foreign over domestic interests. 3 *The Records of the Federal Convention of 1787*, at 327 (Max Farrand ed., 1911); Pet. Add. 82-84 (Dkt. 123 at 33-35).

Through his continued ownership of the Hotel, the President cultivates a channel for domestic and foreign officials to bestow emoluments on him. This upsets the careful balance that is the hallmark of our federal system and the level playing field undergirding the federal policy process generally. The District and Maryland each have a constitutionally protected interest in avoiding entirely the pressure to compete with others for the President's favor by giving him money or other valuable dispensations. That pressure is particularly acute for the District and Maryland because they receive substantial federal funding, have disproportionate economic stakes in federal budgetary allocations, and are home to federal executive agencies. *See* Pet. Add. 173-74 (Am. Compl. ¶ 111). Each is thus placed in a particularly precarious—and injurious—position by the President's violation of the Emoluments Clauses.

The panel's reliance on *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), is misplaced. That suit was brought by five citizens and a local association who were concerned that certain members of Congress might have divided loyalties by virtue of being members of the Armed Forces Reserve. *Id.* at 210 & n.1. The Court determined that the citizens' claimed injury was "abstract" because the injury alleged to accrue *to them* was speculative and "generalized" because it implicated no more than the "interest of [everyone] in constitutional governance." *Id*. at 216-17. Contrary to the panel's comparison (Op. 32-34), neither is true here. The District and Maryland allege precisely what *Schlesinger* recognized was sufficient: a "particular injury caused by the action challenged as unlawful." 418 U.S. at 221.

Indeed, because the District and Maryland are potential, perceived, or actual *givers* of prohibited emoluments, their injuries are undeniably "personal and individual." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). For example, after the Governor of Maine patronized the Hotel, President Trump signed an executive order that could return state land previously designated as a national monument to private ownership, just as the Governor wanted. *See* Pet. Add. 18-19. This straight line between patronage and policy not only illustrates how *giving* is immediate and personal, but how its success (or apparent success) implicates—and injures—other States. In the District, the injury is particularly inescapable because,

as the local regulator of the Hotel, it cannot extricate itself from whether an ordinary interaction—for example, granting a license for or tax concession to the Hotel—is "routine" or a prohibited emolument. *See* Pet. Add. 17-18.

If left undisturbed, the panel's reasoning would reduce to a "generalized grievance" any State's assertion that it is seeking to "secur[e] observance of the terms under which it participates in the federal system," *Snapp*, 458 U.S. at 607-08. The importance of States' vindication of this right to equal sovereignty, and the far-reaching consequences of erasing it, require reconsideration by the *en banc* court.

B. The Panel Opinion Would Eviscerate the Doctrine of Competitor Standing, In Conflict with Precedent from Other Courts.

Courts regularly rely on "economic logic to conclude that a plaintiff will likely suffer an injury-in-fact" when the defendant's unlawful conduct confers a competitive advantage on one or more of the plaintiff's competitors. *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008); *see also* 3 Kenneth Culp Davis & Richard J. Pierce, *Administrative Law Treatise* 13-14 (3d ed. 1994) ("The Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy the Article III 'injury-in-fact' requirement."), *quoted in Clinton v. City of New York*, 524 U.S. 417, 433 (1998). Under this line of authority, which this Court has previously acknowledged, *Zeneca, Inc. v. Shalala*, 213 F.3d 161, 170 n.10 (4th Cir. 2000), to

allege an injury sufficient to support competitor standing, a plaintiff need only show that it (1) actually participates in a market, and (2) is likely to be specifically disadvantaged by the competitor's allegedly unlawful behavior. *See, e.g.*, *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825 (9th Cir. 2011); *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007) (en banc); *Adams v. Watson*, 10 F.3d 915, 921 (1st Cir. 1993).

Here, the panel accepted arguendo the doctrine of competitor standing (Op. 28), but rejected the allegation that the Hotel reaped a competitive advantage from the President's alleged acceptance of emoluments. In the panel's view, plaintiffs' allegation—that government officials patronize the Hotel to enrich the President—required "speculation into the subjective motives of independent actors who are not before the court." Op. 28. But no speculation is involved. Plaintiffs allege that foreign governments have transferred their business from other local hotels to the President's hotel (Pet. Add. 151-52 (Am. Compl. ¶ 39)), assert that government officials patronize the Hotel to curry favor (Pet. Add. 178 (Am. Compl. ¶ 127)), and quote a government official making precisely that point (Pet. Add. 151-52 (Am. Compl. ¶ 39) ("'Why wouldn't I stay at [the Hotel] blocks from the White House, so I can tell the new president, "I love your new hotel!"'")). These are plausible allegations that government officials have patronized the Hotel to provide the President constitutionally prohibited emoluments. *See, e.g.*, *TrafficSchool.com*, 653

F.3d at 826 (upholding judgment where plaintiffs used survey evidence at trial to demonstrate that defendant's false association with government agency was likely to affect consumer choice); *Adams*, 10 F.3d at 922-23 (explaining that even where competitive harm is not "obvious," a plaintiff can rely on "core economic postulates" informed by "actual market experience and probable market behavior"); *cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) ("[W]e are satisfied that, in these circumstances, respondents have met their burden of showing that third parties will likely react in predictable ways to the citizenship question . . . ."). Indeed, the very nature of the competitor standing doctrine, as articulated by several courts, allows for an inference of rational responses to economic incentives. Those courts have not viewed what amounts to common sense as mere "speculation."

Having cautioned against accepting what other courts view as common sense, the panel hypothesized that prohibiting the President from accepting foreign and domestic emoluments may not fully redress the injury that properties competing with the Hotel now suffer. Op. 29-30. There are at least two flaws in this reasoning. First, it is inconsistent with the logic underlying the Emoluments Clauses to suggest that the opportunity to financially enrich the President would not tempt officials to try to influence him in this way. This is the very temptation that the Framers sought to eliminate through the Clauses.

Second, the panel puts forward a theory of foreign and domestic officials' behavior that is not only wrong, but contrary to the complaint's well-pleaded allegations. The panel reasoned that even if some officials might want to enrich the President, they would patronize the Hotel even if that opportunity were unavailable. Op. 30. In the panel's view, there are only two kinds of officials: those who will avoid the Hotel and those who will inevitably patronize it; there are no officials who can be tipped toward patronage by the chance to tender emoluments. That theory, whatever its ultimate merit, cannot be accepted at the pleading stage where the complaint alleges that officials *are* patronizing the Hotel to enrich the President. *See supra* p. 14.

It is not only plausible but near certain that some officials are inclined to patronize the Hotel to enrich the President and, necessarily, less inclined to patronize competitors. The complaint amply supports that the District and Maryland are suffering the competitive injury that has led other courts to find Article III satisfied.[4]

CONCLUSION

The Court should grant rehearing *en banc*.

[4] For these reasons, the panel's conclusion that the District and Maryland have no *parens patriae* standing (Op. 31-32) is also incorrect.

Respectfully submitted,

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August 26, 2019

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,898 words, excluding the parts of the petition exempted by Rule 32(f). This petition complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

/s/ Leah J. Tulin
Leah J. Tulin

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2019, I electronically filed the foregoing petition with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Leah J. Tulin
Leah J. Tulin